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CJEU Cases C-157/15 Achbita and C-188/15 Bougnaoui

Does 'neutrality' trump religious freedom?

ADINA PORTARU — 24 March, 2017



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1. Introduction

On 14 March 2017 the CJEU upheld the banning of the visible display of any political, philosophical or religious sign in the workplace. As a future



consequence, European companies may introduce certain rules to prohibit other religious, political and philosophical symbols. The cases involved two female employees in France and in Belgium, who were dismissed for refusing to remove their headscarves which covered their hair and neck, but left the face visible. Both cases concern the interpretation of 'genuine and determining occupational requirements' and discrimination on the grounds of religion or belief contrary to Directive 78/2000/EC.

2. Facts of the case

The two cases that were decided jointly by the CJEU, are Samira

Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v. G4S Secure Solutions NV and Asma Bougnaoui, Association de defense des droits de l'homme (ADDH) v. Micropole Univers SA.

The first case (*Achbita*) was referred by the Hof van Cassatie (Court of Cassation) in Belgium and deals with a Muslim woman who worked as a receptionist for *G4S*. At the time when Ms Achbita joined *G4S*, the company had an unwritten rule according to which employees were prohibited from wearing conspicuous signs of a political, philosophical or religious nature in the workplace. When Ms Achbita informed her employer that she wanted to start wearing an Islamic headscarf, she was dismissed. The Belgian Court of Cassation asked the CJEU whether the prohibition on wearing an Islamic headscarf (as provided in a general rule of a private undertaking) amounts to direct discrimination in the interpretation of Directive 78/2000/EC.

The second case (*Bougnaoui*) concerns a French IT consultant who was requested to remove her headscarf when a customer complained. When Ms Bougnaoui refused to comply, she was dismissed. The French Cour de Cassation (Court of Cassation) which was seized with the case asked the CJEU whether 'the willingness of an employer to take account of the wishes of a customer no longer to have the employer's services provided by a worker wearing an Islamic headscarf may be considered a "genuine and determining occupational requirement" within the meaning of Directive 78/2000/EC.

Both applicants challenged the dismissal, which they considered to be discrimination on the grounds of religion or belief contrary to Directive 78/2000/EC. The relevant provision for these cases is Article 4 (1) of Directive 78/2000/EC which states that:

Notwithstanding Article 2 (1) and 2 (2), Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a

characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.

From a legal perspective, the issues that the applicants put forward are similar, but slightly different. The Belgian Court asked whether there is discrimination, within the meaning of Directive 78/2000/EC, when a Muslim employee is banned from wearing a headscarf, if there is a well-established workplace rule which prohibits the wearing of all conspicuous signs of political, philosophical and religious symbols in the workplace in pursuit of a particular conception of 'neutrality'. Conversely, the French Court asked whether the request of a client to no longer have services provided by an employee wearing the Islamic headscarf is a genuine and determining occupational requirement under Article 4 (1) of Directive 78/2000/EC.

The cases were heard jointly on 15 March 2016.

Opinions of the Advocates General

The opinion of the two AGs in the cases (AG Kokott and AG Sharpston) urged the Court to take two different routes in the interpretation of freedom of religion at the workplace, while also highlighting the importance of the case:

the Court is expected to give a landmark decision the impact of which could extend beyond the specific context of the main proceedings and be groundbreaking in the world of work throughout the European Union, at least so far as the private sector is concerned.

AG Sharpston outlined that EU law could provide more protection in the context of Directive 78/2000/EC:

In the context of direct discrimination, the protection given by EU law is stronger. Here, interference with a

right granted under the ECHR may still always be justified on the ground that it pursues a legitimate aim and is proportionate. In contrast, under the EU legislation, however, derogations are permitted only in so far as the measure in question specifically provides for them.'

AG Sharpston favoured a heightened protection of freedom of religion (in the context of EU non-discrimination law), by way of an effective interpretation of norms. This, Sharpston considered, could trigger a difference in interpretation between the CJEU and the ECtHR, which would be 'a wholly legitimate one' in light of Article 52 (3) of the Charter. Conversely, AG Kokott stressed a more limited interpretation of anti-discrimination provisions based on religion or belief under EU law, highlighting that the latter does not involve 'immutable physical features or personal characteristics, such as gender, age, or sexual orientation, [but] rather...modes of construct based on a subjective decision or conviction.'

The value of religion and religious manifestations were differently interpreted by the two AGs. AG Kokott considered that religion is different compared to other characteristics mainly because:

the practice of religion is not so much an unalterable fact as an aspect of an individual's private life and one, moreover, over which the employees concerned can choose to exert an influence...an employee may be expected to moderate the exercise of his religion in the workplace.

Conversely, AG Sharpston in *Bougnaoui* stated that for believers, religious identity and the possibility to manifest it is not only a marginal element, but, an 'integral part of that person's very being...it would be entirely wrong to suppose that, whereas one's sex and skin colour accompany one everywhere, somehow one's religion does not.'

The Judgments

The CJEU judgment related to Ms Achbita found that it does not constitute 'direct discrimination' if a firm has an internal rule banning the wearing of *any* political, philosophical or religious sign. In so doing, the firm equally limits the manifestation of all such beliefs without distinction. In dismissing a claim of direct discrimination, the CJEU noted that there was no information showing that Achbita was treated differently to other employees. The CJEU then proceeded in assessing a claim of indirect discrimination, and stated that:

An internal rule of an undertaking which prohibits the visible wearing of any political, philosophical or religious sign does not constitute direct discrimination... By contrast, such a prohibition may constitute indirect discrimination if it is established that the apparently neutral obligation it imposes results, in fact, in persons adhering to a particular religion or belief being put at a particular disadvantage. However, such indirect discrimination may be objectively justified by a legitimate aim, such as the pursuit by the employer, in its relations with its customers, of a policy of political, philosophical and religious neutrality, provided that the means of achieving that aim are appropriate and necessary. It is for the Belgian Court of Cassation to check those conditions.

Regarding Ms Bougnaoui, the CJEU noted that it was not clear, based on the reference to the CJEU, whether there had been a difference of treatment based either directly or indirectly on religion or belief.

It is therefore for the French Court of Cassation to ascertain whether Ms Bougnaoui's dismissal was based on non-compliance with an internal rule prohibiting the visible wearing of signs of political, philosophical or religious beliefs. If that is the case, it is for that court to determine whether the conditions set out in the judgment in *G4S Secure Solutions* are

satisfied, that is to say, whether the difference of treatment, arising from an apparently neutral internal rule that is likely to result, in fact, in certain persons being put at a particular disadvantage, is objectively justified by the pursuit of a policy of neutrality, and whether it is appropriate and necessary.

The CJEU carried on to generally assert that:

[I]t is only in very limited circumstances that a characteristic related, in particular, to religion may constitute a genuine and determining occupational requirement, a concept which refers to a requirement that is objectively dictated by the nature of the occupational activities concerned or of the context in which they are carried out and does not cover subjective considerations, such as the employer's willingness to take account of the particular wishes of the customer.

3. Commentary and analysis

The simple question asked by the two cases at the CJEU is: Is a private company allowed to dismiss a person because of the personal display of clothing (and, arguably, symbols)?

It is well established law that 'everyone has the right (...) either alone, or in community with others and in public or private, to manifest his religion or belief, in worship, teaching practice and observance.' (art. 9 ECHR, art. 10 CFREU, art. 18 ICCPR) Freedom to manifest one's religion or belief is an essential part of freedom of thought, conscience, and religion, since not being able to bear witness in words and deeds makes void the legal protection of the freedom of thought, conscience, and religion. The ECtHR, which has a long-standing jurisprudence on the matter, has robustly outlined that religious symbols (either in the form of religious garments or objects) constitute a manifestation of freedom of religion or belief and are worthy of protection (see also

Adina Portaru, 'Religious Symbols', in Clarke (ed.), *The 'Conscience of Europe?'* (Kairos 2017)). This protection can, however, be limited on specific grounds: 'public safety and order, health, morals or for the protection of the rights and freedoms of others.' (art. 9(2) ECHR)

This basic position is identified in today's judgment of the CJEU, which highlighted that: 'the concept of religion must be interpreted as covering both the fact of having religious belief and the freedom of persons to manifest that belief in public.' The CJEU analysis carried on to assess whether the treatment limiting religious manifestations amounts to direct or indirect discrimination.

Under Directive 78/2000/EC, direct discrimination occurs where one person is treated less favourably than another has been or would be treated in a comparable situation, on the ground of religion or belief. Such a difference of treatment is allowed in two very limited exceptions: a genuine and determining occupational requirement, and regarding a number of occupational activities within churches and ethos-based organisations.

Moreover, indirect discrimination focuses on the effects which an apparently neutral provision, criterion or practice would have, so as to put persons having a particular religion or belief at a particular disadvantage compared with other persons. Such indirect discrimination could be objectively justified by a legitimate aim, if the means of achieving that aim are appropriate and necessary.

In *Achbita*, the Court indicated that the general policy of 'neutrality' may be legitimate insofar as it only extends to customer-facing employees. When the Court turns to the question of necessity, it adopts an unhelpful piece of circular reasoning. The Court suggested that the measure will be necessary if the rule covers 'only G4S workers who interact with customers.' But that was the reasoning applied to consider the aim to be legitimate and there is no further examination as to why this measure is proportionate.

Such a corporate policy of so-called neutrality should not give a *carte blanche* to discriminate. It is always necessary to assess the context in which the policy was adopted, the aim pursued, and the necessity of implementing the measure.

In assessing proportionality, an analysis of the measure's impact on the applicant is also necessary, since not all addressees of the measure are impacted in the same way. For example, an atheist is impacted in a minimal way by a company ban on religious symbols. Conversely, for a practicing believer, such a ban has a deep, long-lasting and significant impact, affecting the core of his identity.

Furthermore, the legal analysis should examine whether there were any less restrictive means of achieving the aim in question. The CJEU seems to suggest, through today's ruling, that the manifestation of the fundamental right to freedom of religion or belief can be suppressed at the simple will of employers, without any further legal check.

This contradicts Article 9 of the ECHR and the relevant jurisprudence of the ECtHR, which highlights that 'freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.' Such limitations are assessed on a case by case basis, by engaging in a test of proportionality, necessity, and balancing.

Even in the contentious cases at the ECtHR the Strasbourg Court goes thorough such steps. For example, in the *S.A.S. v. France* case, which dealt with the ban on head pieces covering the face, the ECtHR mentioned:

In view of its impact on the rights of women who wish to wear the full-face veil for religious reasons, a blanket ban on the wearing in public places of clothing designed to conceal the face can be regarded as proportionate only in a context where there is a general threat to public safety.

The ECtHR then carried on to say that there had been no threat to public safety in France such as could justify a general ban on the manifestation of religious freedom. It did however approve of the French measure on the grounds of the 'right and freedoms of others.'

Competition between ECtHR and CJEU

The recent case highlights issues of competition and conflict of human rights interpretations. The ECtHR has engaged in the interpretation of Article 9 in the context of religious symbols in a number of cases, including *Sahin v. Turkey*, *Lautsi v. Italy*, and *Eweida and Others v. UK*. Criticism of the heavy reliance on the margin of appreciation, artificial difference between powerful religious symbols and 'passive religious symbols' has been levelled in respect of the Court's sometimes inconsistent jurisprudence in this area.

It has fueled the hopes of practitioners and academics that the CJEU would develop a more solid interpretation of freedom of religion and non-discrimination,^[1] in what was perceived the broader context in which the CJEU operates.^[2]

By placing corporate policies of so-called neutrality above freedom to manifest religion, the CJEU judgment dashes the hope for a robust and consistent protection of freedom of religion. Quite on the contrary, the CJEU judgment lowers the protection of freedom of religion or belief set out by the ECtHR in *Eweida and Others v. UK*. Therein, the ECtHR explicitly stated that it does not rank corporate image or profile of the employer above the right to manifest religious beliefs by the employee.

Ms Eweida, a practising Christian employed by *British Airways*, argued that her employer infringed her freedom of religion, by banning her wearing of a visible Christian cross in the performance of her working duties. The ECtHR found that there had been a violation of Article 9 and highlighted that:

[T]he Court has reached the conclusion in the present case that a fair balance was not struck. On one side of the scales was Ms Eweida's desire to manifest her religious belief. As previously noted, this is a fundamental right: because a healthy democratic society needs to tolerate and sustain pluralism and diversity; but also because of the value to an individual who has made religion a central tenet of his or her life to be able to communicate that belief to

others. On the other side of the scales was the employer's wish to project a certain corporate image. The Court considers that, while this aim was undoubtedly legitimate, the domestic courts accorded it too much weight. Ms Eweida's cross was discreet and cannot have detracted from her professional appearance. There was no evidence that the wearing of other, previously authorised, items of religious clothing, such as turbans and hijabs, by other employees, had any negative impact on British Airways' brand or image. Moreover, the fact that the company was able to amend the uniform code to allow for the visible wearing of religious symbolic jewellery demonstrates that the earlier prohibition was not of crucial importance.

4. Conclusion

The ruling of the CJEU is problematic. Firstly, it departs from the established analysis of limitations on fundamental rights set out by the ECtHR, and it does so in a somewhat circular way. By failing to properly assess the legitimacy of the aim pursued by the measure, and by not even considering its necessity, the CJEU allows private businesses to implement rules which violate the fundamental right to freedom of religion, and lowers the protection of religious freedom set out by the ECtHR. Differing standards as between the two top courts in Europe will, in the long run, lead to inconsistency and to the fragmentation of human rights.

Secondly, the CJEU missed an opportunity to stress the need to accommodate different convictions and beliefs in an increasingly diverse European society. It is the Court's duty to accommodate different convictions and beliefs rather than force a so-called neutrality, which washes away *all* manifestations of religion or belief. The only hint of an accommodation is found in the *Achbita* judgment:

In the present case, so far as concerns the refusal of a worker such as Ms Achbita to give up wearing an

Islamic headscarf when carrying out her professional duties for G4S customers, it is for the referring court to ascertain whether, taking into account the inherent constraints to which the undertaking is subject, and without G4S being required to take on an additional burden, it would have been possible for G4S, faced with such a refusal, to offer her a post not involving any visual contact with those customers, instead of dismissing her.

Unfortunately, the standard advanced by the Court is one in which an employer is required to accommodate the employee unless it would impose an “additional burden”, and in a way that presupposes the validity of banishing a religious employee from public view. That is perhaps a step beyond the pre-Eweida test which simply considered any claim vitiated by the fact an employee could get another job, but is a long way from a legal standard which protects religious freedom.

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[1] Titia Loenen and Lucy Vickers, ‘More is Less? Multiple protection of human rights in Europe and the risks of erosion of human rights standards’, in Morano-Foadi and Vickers (eds.), *Fundamental Rights in the EU: A Matter for Two Courts* (Hart 2015), 159–177. See also analyses of the two courts in the interpretation of non-discrimination in Eugenia Relaño Pastor, ‘Towards Substantive Equality for Religious Believers in the Workplace? Two Supranational European Courts, Two Different Approaches’ (2016) 5 (2) *Oxford Journal of Law and Religion*, 255.

[2] The broader context can be seen in at least two points: the protection of the rights of employees of religious bodies, and the question of indirect discrimination on the basis of religion or belief

(where the ‘group disadvantage’ element can make a significant difference in the interpretation of freedom of religion or belief). See, in this sense, Ronan McCrea, ‘Singing from the Same Hymn Sheet? What the Differences between the Strasbourg and Luxembourg Courts Tell Us about Religious Freedom, Non-Discrimination, and the Secular State’ (2016) 5 (2) Oxford Journal of Law and Religion 183.

Cite as: Adina Portaru, “CJEU Cases C-157/15 Achbita and C-188/15 Bougnaoui – ‘Neutrality’ Trumps Religious Freedom”, *Völkerrechtsblog*, 24 March 2017, doi: [10.17176/20180326-210203](https://doi.org/10.17176/20180326-210203).

ISSN 2510-2567



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